IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. **401** OF **2004**

Mrs. Giwa Fatimat Oluwaseyi,)
(A Nigerian National) lodged)
at Ladies Section, Nasik Road)
Central Prison, Nasik 422101) ...Appellant.
(Orig. Accused)

V/s

1. Mr. Harbans Singh,)
Dy. Commissioner of Customs,)
A.I.U., C.S. International)
Airport, Mumbai.)
)
2. State of Maharashtra.) ...Respondents.

Mr. Francis E. Saldhana with Ms. Aparna Shind
for the appellant.

Mr. P.S. Thakur, advocate for the respondent.

CORAM: V.M.KANADE,J.
DATE: 29th March, 2005

ORAL JUDGMENT:

1. The appellant has filed this appeal challenging the judgment and order passed by the Special Judge in N.D.P.S. Case No. 116 of 2000. By the said judgement and order dated 23/06/2003, the Special Judge held the accused guilty of the offence under section 8(c) which is punishable under sections 21/22 read with section 28 of the Narcotic Drugs and

Psychotropic Substances Act, 1985 (hereinafter called "the N.D.P.S. Act") and convicted and sentenced her to suffer rigorous imprisonment for 10 years and to pay fine of Rs 1 lakh and, in default of payment of fine, to suffer rigorous imprisonment for six months. The accused was acquitted of the offence punishable under section 135(1)(a) and 135(1)(ii) of the Customs Act.

2. The prosecution case in brief is that the Commissioner of Customs received information that the accused was to board the flight to go to Nairobi on 03/06/2000 and when she approached the X-ray counter, her baggage was screened through the X-ray machine by the attendant at the X-ray machine, Shri D'lima who noticed some black patches on the screen and, therefore, called the Custom Officer. Accordingly, panchas were called by the Custom Officer and, in the presence of panchas the accused was asked to put the bag on the X-ray machine for screening wherein the Custom Officer noticed dark patches on the screen which gave an impression of contraband being concealed in it. Thereafter, on detailed examination of one of the bags having green colour, they found two speakers of Music System of Akai Company and on inspection of the speakers they noticed that one black colour bag

containing white colour powder was wrapped with an adhesive tape to the said speakers. The said powder was analysed with the help of a testing kit and the said powder tested positive, revealing that the powder was heroin. After the bags were weighed, it was found that the weight was 450 grams each. In the personal search of the accused, receipt of the purchase of the Music System was found. The sample was sent to the Chemical Analyser who reported the presence of micital morphine (heroin). The statement of the accused was recorded under section 108 of the Customs Act. In her statement, she revealed that she had come to Mumbai in the first week of May alongwith her husband and, thereafter, they had gone to Delhi by Indian Airlines and had stayed in the hotel for three days. When she was about to leave on 02/06/2000, one Farook who was the friend of her husband gave her Akai Music System which was to be given to her husband in Nigeria and that she was not aware about the contents of the said contraband. A complaint was filed. The statements of the witnesses were recorded. A charge-sheet was framed against the accused. She pleaded not guilty to the said charge and the Trial Court convicted her and sentenced her to suffer rigorous imprisonment.

3. The learned Counsel appearing on behalf of the appellant submitted that the prosecution had not established that the accused was in conscious possession of the alleged contraband which was recovered from the two speakers of Akai Music System. He submitted that the accused in her statement which was recorded under section 108 of the Customs Act had admitted that she had no knowledge about the contraband being concealed in the speakers. He submitted that though the accused was in the custody of the Officers of the Customs, she had not confessed that she had carried the said contraband for the purpose of taking the same out of India. The learned Counsel relied on the Judgment of the Supreme Court in the case of Abdul Rashid Ibrahim Mansuri vs. State of Gujarat reported in **JT 2000 (1) SC 471** and another judgment in the case of State of Punjab Vs. Balkar Singh and another reported in **2004 SCC (Cri) 838**. He, thereafter, relied upon the judgement in the case of Narcotics Control Bureau, Jodhpur vs. Murlidhar Soni and others reported in **2004 SCC (Cri) 1561**. The learned Counsel, thereafter, submitted that there was a serious lacuna in the prosecution case regarding the safe custody of the seized articles and the Warehouse Register was not produced. He submitted that in the absence of Warehouse Register, there was no conclusive

evidence to show that the seized articles were kept at the Warehouse and, therefore, he submitted that the tampering of the seized contraband could not be ruled out.

4. The learned Counsel appearing on behalf of the respondent, on the other hand, vehemently opposed the said submissions made by the learned Counsel appearing on behalf of the appellant - accused. He submitted that the presumption was raised under the N.D.P.S. Act regarding knowledge of the contraband and that the presumption had to be rebutted by the accused. He submitted that, in the present case, this presumption had not been rebutted. He submitted that merely because the accused had not admitted her guilt in her statement which was recorded under section 108 of the Customs Act, cannot be the ground for acquitting the accused as there was other sufficient evidence on record which indicated that the Music System had been purchased by the accused as the receipt for purchase of the said Music System was found in her possession. He submitted that the other evidence which was brought on record conclusively proved beyond the reasonable doubt that the accused was conscious and had knowledge about the contraband and she was caught red-handed at the Airport while trying to sneak out the heroin by

concealing it in the loud-speakers. He submitted that the ratio of the judgments on which reliance was placed by the appellant-accused was not applicable to the facts of the present case. As regards the non-production of Warehouse Register is concerned, he submitted that merely because the Warehouse Register had not been produced that would not create any doubt regarding the veracity of the other witnesses who had stated that the samples were sealed in packet and were sent to the Chemical Analyser. He submitted that in view of the evidence of the other witnesses, mere non-production of the Warehouse Register would not vitiate the prosecution case regarding the safe custody of the samples which were seized from the loud-speakrs of the Music System which was begoning to the accused. He submitted that the Trial Court has considered the evidence and had given cogent reasons for convicting the accused. He submitted that this Court may not interfere with the order passed by the Special Court.

5. Heard the learned Counsel appearing on behalf of the appellant - accused and the learned Counsel for the respondents at length. I have given by anxious consideration to the submissions made by the learned counsel appearing on behalf of the appellant and the

respondents.

6. The present appeal has been filed through jail as the appellant was not in a position to engage an advocate. Therefore, an advocate was appointed from the amicus curiae panel who appeared on behalf of the appellant.

7. The prosecution in support of its case has examined in all 9 witnesses. Before the evidence of these witnesses is taken into consideration, it would be relevant to summarise the brief facts.

8. It is an admitted position that the accused was interrogated by the Officers of the Air Intelligence Unit at Mumbai Airport on 03/06/2000 near the screening machine at the X-ray counter. The appellant - accused is a Nigerian National and was proceeding to Lagos by Kenya Airlines Flight. The security staff of the Airport noticed some black patches on the screening machine while screening the three zipper bags belonging to the accused and, therefore, called the Customs Officer. The Customs Officer, in the presence of panchas, asked the accused to put the three bags on the trolley and asked her whether the said bags belonged to her and the accused stated that

the three bags belonged to her. Thereafter, they were again put through the screening machine and certain black dark patches appeared on the screening machine. Accordingly, the Music System was searched in the presence of panchas, which resulted in recovery of one packet wrapped with black coloured adhesive tape from each of the two speakers of Akai Music System. The said two packets contained white powder. This powder was tested with the testing unit which gave positive result regarding presence of heroin. The accused was searched by a lady Officer after complying with the provisions of section 50 of the N.D.P.S. Act but nothing incriminating was recovered either from her person or from her hand-bag. The receipt of the purchase of the Music System was, however, found in her purse. The sample was weighed and it was found that it was 890 gms in weight.

9. The statement of the accused was recorded under section 108 of the Customs Act, 1962.

10. The short question which falls for consideration before this Court is : whether the contraband which was concealed in the two loud-speakers was with the knowledge of the accused or the accused was conscious of the said contraband? So far as the provisions of

the N.D.P.S. Act are concerned, it is no doubt true that sections 34 and 54 of the said Act raise presumption about the knowledge of possession by the accused. However, before the said presumption is raised, it is the duty of the prosecution to first prove that the accused was conscious of the possession and only thereafter the presumption would be raised regarding knowledge of the contraband. In the present case, in my view, the prosecution has not established beyond the reasonable doubt that the accused was conscious of the contraband being concealed in the two loud-speakers for the following reasons.

11. Perusal of the statement of the accused which was recorded under section 108 of the Customs Act is at Exhibit-18 which reveals that one Farook who was the friend of her husband had given the said Music System to her for delivering the same to her husband since her husband was dealing in electronic goods. She has stated that her husband had a shop at Ibaden, Nigeria and that, usually, he gets electronic goods from other countries and sells them at Nigeria. In her statement, she stated that the said Farook had given her a brand new Akai Audio CD Player. In her statement, she had stated that she did not remember the phone number of the said Farook but stated that

she had met him alongwith her husband at Delhi. A specific question was asked to her as to whether she was aware of the concealment of white powder in the speakers of the Music System and she has emphatically denied about any knowledge or idea about the white powder which was recovered from the Music System. She has further stated in her statement that although she was not aware of the concealment of the white powder, she did admit recovery of the said white powder from the speakers of the Music System. During the course of interrogation, she stated that though she did not have address of Farook, she had a Mobile Phone Number of the lady who could give Farook's address and contact number and she had given the said Mobile Phone Number. Though the accused had admitted that white powder was found in two speakers, she had denied the knowledge about the concealment of the said powder. Though the statement was recorded by the Customs Officers, from the evidence it can be seen that no steps were taken by the prosecution either to trace the said lady who had contact number of the said Farook or to search the said Farook in Delhi. It was the duty of the prosecution to go to the root of the case to find out the truth and further investigate whether the said Farook was involved in the matter. This non-investigation by the Police reflects the

casual manner in which the Police had investigated this case. It was essential and necessary for the prosecution, in order to rule out the possibility of innocence of the accused, to have taken some steps to trace the said Farook. However, from the evidence, it can be seen that no steps were taken by the Investigating Officer. P.W. 9 - Mrs. S.V. Bhambani, the Investigating Officer, has nowhere stated in her evidence about the steps which were taken by her or by other Officers to find out or trace the said Farook.

12. The said contraband was found concealed in two speakers and the speakers had to be unscrewed and, thereafter, the two packets which were wrapped with the adhesive tape were revealed to the Customs Officers. Thus, ordinarily, it would not have been possible for the accused or any other person who had carried the said luggage being a brand new System to know that it contained the contraband material.

13. The prosecution has examined in all 9 witnesses.

. P.W.1 - Bhupendra Prabhu, who was the Investigating Officer, drew the panchanama on 05/06/2000 and deposited two samples with office of Deputy C.C. for analysis.

. P.W.2 - Pradeepkumar Lawrence was the Superintendent in charge of 'A' Batch of Air Intelligence, who supervised the search and seizure from the loud-speakers of the Music System which was being carried by the accused.

. P.W. 3 - Anand Kumar Saxena was the Assistant Chemical Examiner who analysed the sealed packets of the seized contraband.

. P.W.4 - Mohan Shirkar, I.O. was on night duty in the said 'A' Batch of AIU and he was asked to deposit two samples in the Warehouse at Sahar Airport on 03/06/2000 and on 27/07/2000, P.W. 4 took these two samples from the Warehouse and deposited the same with FSL Kalina.

. P.W.5 - Subhas Phadnis, I.O., was on duty at the said time and he deposited two bags in the Warehouse at the Airport.

. P.W.6 - Yograj Karwasare, Superintendent of Customs and P.W. 7 - Rashmi Malondkar, employee of Air-India, were also on duty at the Sahar Airport. P.W. 6 recorded the statement of the Assistant Security

Officer Mr. Steve D'Lima and P.W.7 was posted at Air-India X-ray counter.

. P.W. 8 - Annamma Yaunan, Superintendent of Customs, supervised the search of the accused and P.W. 9 - S.V. Bhambani, I.O. was on duty on the said night and she took search of the accused.

14. Thus, from the entire evidence, it can be seen that apart from the fact that there were two bags containing heroin which was seized from the loud-speakers, there is no other evidence brought on record by the prosecution to establish that the accused was conscious of the possession of the contraband. Even if the accused had admitted the knowledge about the concealment of the contraband in her statement recorded under section 108 that would have been sufficient to prove the initial burden of possession of the contraband. In the absence of any other evidence, it would be difficult to come to a conclusion that the accused was conscious and had knowledge about the concealment of the contraband in the loud-speakers of the Music System. In the case of Narcotics Control Bureau, Jodhpur vs. Murlidhar Soni and others reported in **2004 SCC(Cri) 1561**, the Supreme Court in the facts of the said case held that since

there was no evidence to show that the accused had knowledge that the cloth bundle contained any contraband and in the absence of any material showing conscious possession of the contraband, the conviction under section 21 was not maintainable. In the said case, Officers of the Department, after receiving confidential information, organized a raiding party and saw that the accused and his father at about 9.00 P.M. were carrying a cloth bundle. The raiding party accosted them and expressed their desire to search the bag which was carried by the father of the accused. After the cloth bag was searched, heroin weighing about 2.41 kg was recovered and the two accused were arrested. The Supreme Court, in the facts of the said case, held that there was no material to show that the respondents had knowledge of the contents of the bag which was carried by the father of the accused and the Supreme Court in the said case ignored the confessional statement of the accused which was recorded under section 67 of the said Act and acquitted the accused on the ground that the conscious possession had not been proved. In my view, the ratio of the said case is squarely applicable to the facts of the present case. In the present case, the accused has not confessed in her statement which was recorded. There is an additional factor in the facts of the

present case to support the case of the defence regarding absence of any knowledge regarding concealment of the contraband in the loud-speakers. The Supreme Court in the case of State of Punjab vs. Balkar Singh and another reported in **2004 SCC (Cri) 838** had an occasion to consider what was the nature of proof required to prove the possession of the prohibited substance? In the said case, some Police Officers along with some other Home Guard officials were doing patrol duty on 05/12/1991. When they reached near Bridge, they found a cluster of bags kept in a field and the accused sitting on them. The Investigating Officer suspected that the bags contained contraband material. He, therefore, apprised the accused of their right under section 50 of the N.D.P.S. Act and, thereafter, on search being taken, poppy husk was found from each bag. The Supreme Court, in the facts of the case, held that the Police did not make any investigation as to how 100 bags of poppy husk were transported to the place of the incident and also did not adduce any evidence to show the ownership of the poppy husk. The Supreme Court in para 3 of its judgement bserved as under:-

"3. ....In fairness, the police should have conducted further investigation to prove that these accused were really in possession of these articles. The failure to give any satisfactory explanation by the accused for being present on that place itself does not prove that they were in possession of these articles....."

For the aforesaid reasons, the judgment of the High Court in the said case acquitting the accused was confirmed by the Supreme Court. In the present case also, the Police Officers have not investigated the whereabouts of the said Farook and the other lady whose Mobile Phone Number was given by the accused. No material, therefore, was brought on record to establish that the accused had knowledge about the contraband being concealed in the speakers.

15. The Supreme Court in the case of Abdul Rashid Ibrahim Mansuri vs. State of Gujarat reported in **JT 2000(1) SC 471** had an occasion to consider the scope of the presumption raised under section 35 and, in the said case, the accused was an auto-rickshaw driver and

the Police Personnel intercepted the auto- rickshaw which was proceeding to Shahpur (Gujarat) and four gunny bags were found stacked in the vehicle. On further inquiry, it was found that it contained Charas. During the investigation, it was revealed that the gunny bags were loaded in the auto-rikshaw by two persons. A primary search was made. Thereafter, the search was dropped and the charge-sheet was filed against the auto-rikshaw driver. The High Court held that the accused had failed to prove that he did not know the contents of the gunny bags and, therefore, the presumption raised under section 35 remained unrebutted and the High Court convicted and sentenced the accused. The Supreme Court in para 21, after noting the contents of section 35, has observed as under:-

> "21. No doubt, when the appellant admitted that narcotic drug was recovered from the gunny bags stacked in the auto-rickshaw, the burden of proof is on him to prove that he had no knowledge about the fact that those gunny bags contained such a substance. The standard of such proof is delineated in sub-section (2) as "beyond a reasonable doubt". If the court, on an appraisal of the entire evidence does

not entertain doubt of a reasonable degree that he had real knowledge of the nature of the substance concealed in the gunny bags then the appellant is not entitled to acquittal. However, if the court entertain strong doubt regarding the accused's awareness about the nature of the substance in the gunny bags, it would be a miscarriage of criminal justice to convict him of the offence keeping such strong doubt dispelled. Even so, it is for the accused to dispel any doubt in that regard."

"22. The burden of proof cast on the accused under Section 35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that appellant could not have had the knowledge or the required

intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence."

The Supreme Court, therefore, in the context of sub-section 2 of section 35 has observed that after the appraisal of the evidence if the court does not entertain doubt of a reasonable degree that the accused had some knowledge of the nature of the substance then, in that event, the accused is not entitled to be acquitted. The Supreme Court, however, sounded a note of caution in respect of the presumption which was to be raised and observed that if the Court entertains a strong doubt regarding the awareness of the accused about the nature of the substance in the gunny bags, the accused was liable to be acquitted by giving him a benefit of doubt.

16. In the present case, the appellant has not given any confessional statement in her statement which was recorded under section 108 of the Customs Act. She has not admitted her guilt or knowledge about the concealment of the contraband in the loud-sepakers of the newly purchased Akai Music System. The Custom

Officers and the Investigating Officers have not investigated whether Farook and the lady whose Mobile Phone Number was revealed by the accused had anything to do with the concealment of the contraband. There was no other material which was brought on record to establish that the accused had knowledge about the concealment of the contraband. In the present case, the accused was proceeding to Nigeria. Admittedly, her husband had left earlier. She has stated that her husband was having a shop and was dealing in electronic goods which fact has not been seriously disputed by the prosecution. She was carrying a brand new Akai Music System which was given to her by a friend of her husband, Farook. In the face of these facts and in the absence of any investigation by the Police, a strong doubt is raised regarding the awareness of the accused regarding the nature of the substance in the loud-speakers. The substance was concealed in such a manner that it would have been impossible for a layman to have noticed the concealment. In these circumstances, in my view, the circumstances and the facts which emerge from the prosecution case reveal that the appellant could not have had knowledge of the required intention and, therefore, the burden cast on the accused under section 35 has been discharged. The Supreme Court in

the case of Abdul Rashid Ibrahim Mansuri (supra) in para 22 has observed as under:-

> "22. The burden of proof cast on the accused under Section 35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross-examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence."

17. In my view, therefore, the prosecution has not established beyond the reasonable doubt that the accused was conscious about the contraband concealed in

the loud-speakers in the Akai Music System and, therefore, she is entitled to be given a benefit of doubt.

18. Apart from the fact that the prosecution has not established the fact of conscious possession by the accused, there are certain discrepancies in the prosecution evidence regarding the safe custody of the alleged samples which were retrieved from the two loud-speakers. P.W. 4 - I.O. Mohan Shirkar in his evidence has deposed that he was asked to deposit the seized property in the Warehouse at Sahar Airport, Customs Department and he was given two sealed packets which were intact. The sample packets were bearing the seal of the Customs. He, thereafter, took the samples to the Warehouse in-charge Shri Vedprakash who took the samples and gave a copy of the forwarding memo which was signed by him. The prosecution has not examined the said Warehouse in-charge Shri Vedprakash to corroborate the statement of P.W.4 and, therefore, the prosecution has not proved the signature on the forwarding memos which are at Exhibits-26 and 27. Further, the said exhibits do not have seal of the Customs. Perusal of the memos would reveal that there is a note at the bottom which states that all articles were received and entered in the register, yet the

Warehouse Register has not been produced by the prosecution. There is much substance in the submissions made by the learned counsel appearing for the appellant. Non-production of the Warehouse Register creates a doubt regarding the safe custody of the samples and regarding the veracity of the prosecution case.

19. In view of the above, judgement of the Trial Court will have to be quashed and set aside. The Trial Court also erred in drawing adverse inference from the statement of the appellant-accused which was recorded under section 313 Cr.P.C. and has not considered the ratio of the judgments on which the reliance is placed by the accused in its proper perspective.

20. In the result, the appeal is allowed. The judgment and order passed by the Trial Court is set aside. The accused is acquitted of the offence punishable under section 8(c) punishable under sections 21/22, 23 read with section 28 of the N.D.P.S. Act. The accused be released forthwith, unless she is otherwise required in any other case. Pass-port of the appellant - accused be returned to the appellant forthwith.

21. I must record my appreciation for the assistance rendered by Shri F.E. Saldhana and Ms. Aparna Shinde, advocates who were appointed from the amicus curiae panel.

22. Issuance of certified copy expedited.

(V.M. KANADE, J.)